

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GARRY R. ARCHEY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11516
Trial Court No. 3KN-08-106 CI
t/w 3KN-06-1809 Cr

MEMORANDUM OPINION

No. 6171 — April 22, 2015

Appeal from the Superior Court, Third Judicial District, Kenai,
Anna M. Moran, Judge.

Appearances: Janella Combs Kamai, Johnson & Combs, P.C.,
Kodiak, for the Appellant. Eric A. Ringsmuth, Assistant
Attorney General, Office of Criminal Appeals, Anchorage, and
Michael C. Geraghty, Attorney General, Juneau, for the Appel-
lee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley,
District Court Judge.*

Judge ALLARD.

Garry R. Archey was convicted of multiple counts of misconduct involving
a controlled substance for manufacturing methamphetamine and possessing chemicals

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska
Constitution and Administrative Rule 24(d).

used in the manufacture of methamphetamine. After these convictions were affirmed on appeal, Archey filed an application for post-conviction relief, alleging that he was entitled to a new trial because his trial and appellate attorneys provided ineffective assistance of counsel. The superior court dismissed the application for failure to state a prima facie case.

In this appeal, Archey renews two of his claims. He asserts that his trial attorney was ineffective: (1) for failing to establish proper grounds for excluding an incriminating telephone call he made to his son while he was incarcerated; and (2) for failing to call a potentially exculpatory witness. Archey also argues that the superior court erred by dismissing his application without giving him prior notice and without holding an evidentiary hearing. For the reasons explained below, we find no merit to these claims and affirm the judgment of the superior court.

Facts and proceedings

Archey's convictions arose from a Soldotna Police Department investigation of two sisters, Lisa Samson and Joanna Samson-Sills, who repeatedly purchased Sudafed in the Kenai-Soldotna area.¹ During that investigation, Sills admitted to the police that she had purchased the Sudafed and said that Archey had been using it to make methamphetamine.² In addition, one of Sills's neighbors told the police that Archey asked him to padlock a trailer belonging to Samson.³ The police searched the

¹ *Archey v. State*, 2010 WL 2436739, at *1 (Alaska App. June 16, 2010) (unpublished).

² *Id.*

³ *Id.*

trailer and found equipment and materials used to manufacture methamphetamine.⁴ They also found a “mobile meth kit” in a black canvas bag in a hole outside the trailer.⁵

Archey’s defense at trial was that the methamphetamine manufacturing equipment and materials belonged to Sills, not to him.⁶ To rebut that defense, the State obtained recorded phone calls Archey made from the Wildwood Correctional Center while he was awaiting trial.⁷ In one of those phone calls, Archey’s son mentioned that the police found the black bag, and Archey responded that someone should tell Sills to stop talking to the police.⁸

Archey’s claim that his trial counsel was ineffective for failing to establish proper grounds to exclude the recording of his phone call from jail

To establish a prima facie claim for ineffective assistance of counsel, a defendant must plead facts showing that (1) the attorney’s performance fell below the standard of minimal competence for a criminal lawyer and (2) there is a reasonable possibility that the outcome of the trial would have been different but for the attorney’s incompetence.⁹ In this analysis, the trial attorney’s actions are presumed to have been competent.¹⁰

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at *4.

⁷ *Id.* at *4-5.

⁸ *Id.* at *4.

⁹ *Burton v. State*, 180 P.3d 964, 968 (Alaska App. 2008); *see Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974).

¹⁰ *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988).

Archey argues that his trial attorney was ineffective because he did not “fully explore” whether the State violated the discovery rules by not disclosing the recording of his phone call to his son from jail before trial. The State obtained the recordings from the jail after the defense rested its case and it used the evidence in its rebuttal case.¹¹ The phone calls were therefore not known to the defense until the middle of trial.

Under former Alaska Criminal Rule 16(b)(4)(ii),¹² the State’s pretrial discovery obligation applies to information in the possession of the prosecutor, the prosecutor’s staff, or “any others who have participated in the investigation or evaluation of the case and who regularly report[,] or with reference to the particular case have reported[,] to the prosecuting attorney’s office.”¹³

At Archey’s trial, his attorney argued that former Criminal Rule 16(b)(4)(ii) applied to the recordings of the phone calls based on the theory that the prison staff participated in Archey’s prosecution by recording his calls. The attorney argued that the phone calls should be excluded on this basis. He also argued that the recordings were unduly prejudicial and moved for a mistrial. The superior court denied these requests and admitted the evidence.¹⁴

Archey challenged the superior court’s decision to admit this evidence in his direct appeal to this Court. We found no merit to his claims because the trial record revealed no evidence that prison staff participated in Archey’s prosecution prior to the

¹¹ *Archey*, 2010 WL 2436739 at *4-5.

¹² This rule has since been renumbered as Alaska Criminal Rule 16(b)(4)(A)-(B), but the substance of the rule remains the same.

¹³ *See Archey*, 2010 WL 2436739, at *5 (discussing this rule).

¹⁴ *Id.*

prosecutor’s mid-trial request for the recordings of Archey’s phone calls.¹⁵ We concluded that, in the absence of a discovery violation, Archey failed to establish that the superior court should have ordered exclusion of the evidence or declared a mistrial.¹⁶

In his application for post-conviction relief, Archey argued that his trial attorney did not do enough to establish that the State violated its discovery obligations. But again, Archey provided no specific evidence that prison staff “participated in the investigation or evaluation of the case” or reported Archey’s phone calls to the prosecutor’s office prior to the State’s mid-trial request for the recordings.¹⁷ Instead, Archey made only conclusory assertions that the recorded calls were made “in cooperation with the Alaska Department of Law and police authorities” and therefore “excludable as a remedy for violation of Alaska Criminal Rule 16’s requirements of pretrial disclosure.”

The superior court was not obligated to accept Archey’s “*pro forma* assertions of the ultimate facts to be proved,” even at the pleadings phase.¹⁸ We agree with the superior court that Archey failed to establish a *prima facie* case for relief on this claim.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Former Alaska R. Crim. P. 16(b)(4)(ii); *see generally State v. Avery*, 211 P.3d 1154, 1159 (Alaska App. 2009) (holding that a prisoner’s rights against unreasonable search and seizure are not violated when the prisoner’s telephone calls are monitored and recorded).

¹⁸ *LaBrake v. State*, 152 P.3d 474, 481 (Alaska App. 2007).

Archey's claim that his trial counsel was ineffective for failing to call a potentially exculpatory witness

Archey next argues that the superior court erred in dismissing his claim that his trial attorney was ineffective in failing to investigate, or present, the testimony of a potentially exculpatory witness, Gordon Pentecost.

In support of this claim, Archey submitted an affidavit by Pentecost asserting that he had personal knowledge that Lisa Samson, Archey's co-defendant, controlled and operated the methamphetamine laboratory. Pentecost also asserted that he told Archey's trial attorney that he was willing to testify to this knowledge. Archey also submitted an affidavit from his trial attorney in which the attorney stated that he did not remember whether he met with Pentecost, but he did recall making the decision not to call Pentecost. He also recalled having a conversation with another defense attorney who warned him that Pentecost was facing criminal charges of his own and was unlikely to be helpful as a defense witness.

On appeal, Archey argues that his pleadings state a prima facie case for relief because no competent attorney would rely on another attorney's assessment of a potentially exculpatory witness without doing any independent investigation. We conclude that, even assuming Archey's trial attorney was incompetent for failing to call Pentecost as a witness, Archey has not shown that he suffered prejudice as a result.¹⁹ As the superior court emphasized, Pentecost's affidavit did not assert that he had any knowledge of Archey's involvement (or lack of involvement) in the manufacture of methamphetamine or in the possession of drugs used to manufacture methamphetamine — the conduct underlying Archey's convictions. Pentecost only asserted that he could testify that Samson, not Archey, controlled the methamphetamine laboratory.

¹⁹ See *Burton v. State*, 523 P.3d 964, 968 (Alaska App. 2008); see also *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974).

But Archey was ultimately acquitted of the charge that he maintained a dwelling used for keeping or distributing controlled substances.²⁰ Consequently, even if Pentecost had testified that Samson controlled the laboratory, there is no reasonable possibility that his testimony would have altered the outcome of Archey's case. Archey has therefore failed to show that he was prejudiced by his trial attorney's decision not to call Pentecost as a witness.

Archey's claim that the trial court made procedural errors in dismissing his application for post-conviction relief

Archey claims that the trial court erred in failing to provide him with notice of its intent to dismiss his application for failure to state a prima facie case. He also argues that he was entitled to an evidentiary hearing on his claims.

In the superior court, Archey filed two amended applications for post-conviction relief, and the State filed motions to dismiss both applications. Archey then filed oppositions to the State's motions.

When the State files a motion to dismiss an application for post-conviction relief, the "applicant receives both clear notice that dismissal has been proposed and a statement of reasons for the proposed dismissal."²¹ Therefore, when a trial court dismisses an application for post-conviction relief for the reasons stated in the State's motion, the court is not required to give the applicant notice of its intent to do so.²²

Archey argues that the superior court was required to give him notice because the court's reasons for dismissing his applications were "outside the scope" of

²⁰ *Archey*, 2010 WL 2436739, at *3, 6.

²¹ *Tall v. State*, 25 P.3d 704, 707 (Alaska App. 2001).

²² *See Altman v. State*, 2005 WL 121868, at *2 (Alaska App. Jan. 19, 2005) (unpublished) (citing *Tall*, 25 P.3d at 707-08).

the State's motions to dismiss. But Archey has not explained with any specificity how the State's motions failed to put him on notice that the court might dismiss his applications for the reasons set out in the court's order. We therefore find no error in the court's decision to dismiss the applications without giving Archey notice of its intent to do so.

We also find no merit to Archey's claim that he was entitled to an evidentiary hearing. An application for post-conviction relief that fails to establish a prima facie case is subject to dismissal without an evidentiary hearing.²³ As we have explained, Archey failed to establish a prima facie case with respect to the claims he raises in this appeal, and thus there was no need to conduct an evidentiary hearing.

Conclusion

The judgment of the superior court is AFFIRMED.

²³ Alaska R. Crim. P. 35.1(f)(3); *Tall*, 25 P.3d at 707-08.